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NOV 14 1906
JAMES H. McKENNEY,
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MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR

AND

BRIEF OF DEFENDANTS IN ERROR

IN SUPPORT OF SAID MOTION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

CHARLES P. WISE,
GEORGE F. McNULTY,
JAMES A. SEDDON AND
ROBERT A. HOLLAND, Jr.,
Attorneys for Defendants in Error.

No. 133.

OCTOBER TERM, 1906.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL, DEFENDANTS IN ERROR.

MOTION TO DISMISS WRIT OF ERROR

The defendants in error have filed in this Court a motion to dismiss the writ of error. Said motion to dismiss is as follows, caption omitted:

MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR.

Now comes The National Enameling & Stamping Company and George Wettengel, defendants in error, in the above entitled cause, by their attorneys, and move this honorable Court to dismiss the writ of error sued out herein by Conrad Wecker, plaintiff in error.

For ground of their motion defendants in error assign that this Court has no jurisdiction to entertain said writ of error for the following reasons:

I.

Because no final judgment disposing of the entire case has been rendered in this cause. On the contrary a mere judgment of dismissal was entered (transcript of the record, page 20). The said judgment entered

against the plaintiff in error was not in invitum, but was entered practically at the request of the plaintiff in error. In other words, when the case was called for trial, and the plaintiff refused to proceed, there was nothing for the Court to do but to dismiss the cause. There was no judgment entered disposing of the cause, and no judgment which would prevent the plaintiff in error from filing a new suit either in the State Court for an amount less than Two Thousand Dollars, or in the Federal Court for a larger amount. In effect the plaintiff in error took a voluntary non-suit. No writ of error could properly be granted in the case until final judgment had been entered disposing of all the matters in issue.

II.

Because even had final judgment been entered disposing of the entire cause on the merits, this Court would have had no jurisdiction to entertain this writ of error, but a writ of error could only be entertained and passed upon by the United States Circuit Court of Appeals for the Eighth Judicial Circuit. See Act of March 3, 1891, Section Six. This writ of error does not fall within the provisions of Section 5 of said Act which provides that where the jurisdiction of the court alone is an issue, the question of jurisdiction is properly determined by this Court. Reference to the transcript of the record will show that the question of jurisdiction of the court is not the only question involved in this case. The trial Court not only overruled the motion of the plaintiff in error to remand the cause to the State Court, but also sustained the demurrer to the petition of the plaintiff in error filed by George Wettengel, one of the defendants in error. (Transcript of the record, page 20.) It also appears that sub-

sequently the plaintiff in error filed his assignments of error, one of which is as follows: "Fifth: The Court erred in sustaining the demurrer of the defendant, George Wettengel." (Transcript of the record, page 23.) It also appears that plaintiff in error, in his prayer for a writ of error, avers that certain errors were committed to his prejudice, and assigned that said errors appeared from the assignments of error theretofore filed. (Transcript of the record, pages 23 and 24.)

As the writ of error, therefore, was asked in order that the errors claimed in the assignments of error might be corrected, said writ of error was not sued out merely on the question of jurisdiction. Therefore, this Court has no jurisdiction to entertain or pass upon the writ of error in this cause.

Charles P. Wise,
George F. McNulty,
James A. Seddon, and
Robert A. Holland, Jr.

STATEMENT IN REFERENCE TO MOTION TO DISMISS WRIT OF ERROR.

This cause originated in a Circuit Court of the State of Missouri, the plaintiff in error having joined therein The National Enameling and Stamping Company, an Illinois corporation; Harry Schenk, a resident of Illinois, and George Wettengel, a resident of the State of Missouri. A petition to remove the cause was filed on the ground that the joinder of defendant George Wettengel was not made in good faith. (Transcript of Record, pages 7-10.) The cause was removed, and subsequently plaintiff in error filed a motion to remand. (Transcript of Record, page 14.) Affidavits were filed by the parties, and the Federal Court overruled the motion to remand. (Transcript of Record, pages 16-19). Subsequently the Federal Court sustained a demurrer to the petition filed by defendant George Wettengel. (Transcript of Record, page 20.) Thereafter the plaintiff in error filed assignments of error in which he specified that the Court erred in overruling the motion to remand, **and in sustaining the demurrer of defendant Wettengel.** (Transcript of Record, page 23.) Thereafter plaintiff in error filed a petition for a writ of error in which he averred that certain **errors** were committed to his prejudice, and stated that said errors appeared in the assignments of error. (Transcript of Record, pages 23 and 24.) When the case was called for trial, the plaintiff in error refused to proceed. Whereupon the Court dismissed the cause. (Transcript of Record, page 20.)

On the 26th day of April, 1905, the plaintiff in error secured from the District Judge a certificate to the effect that the only question decided by the Court con-

cerned the jurisdiction of the Court, but subsequently, on September 15th, 1905, plaintiff in error elected to file the assignments of error above mentioned in which he raised, in addition to the jurisdictional point, the question of correctness of the ruling of the Court in sustaining the demurrer filed by defendant Wettengel. (Transcript of Record, page 23.)

BRIEF OF THE ARGUMENT.

I.

The motion to dismiss this writ of error should be sustained—

(a) Because the writ of error was not sued out to review a final judgment.

McLish vs. Roffy, 141 U. S. 661.
U. S. vs. Evans, 5 Crauch 280.
Evans vs. Phillips, 4 Wheat 73.
In re Aspinwall, 90 Fed. Rep. 675.
In re Coe, 49 Fed. Rep. 481.

(b) Because the question of jurisdiction of the Federal Court is not the only question raised.

McLish vs. Roffy, 141 U. S. 661, 668.

ARGUMENT ON MOTION TO DISMISS.

The above motion is self-explanatory, and a citation of authorities in support thereof is hardly necessary.

The first ground of the motion is that the judgment rendered in this cause is not a judgment from which, under the federal practice, a writ of error lies. The fundamental principle governing such matters is that a party can never sue out a writ of error to review a judgment unless the judgment is final and is rendered against him in invitum. (McLish vs. Roff, 141 U. S., 661, 668.) The practice existing in certain code states allowing the plaintiff, upon an adverse ruling of any kind being made to take a non-suit with leave to subsequently appeal therefrom does not exist in the Federal Courts. **In this case the plaintiff in error in effect took a voluntary non-suit.** It is true that the Federal Court overruled the motion of plaintiff in error to remand, but this did not prevent the plaintiff in error from trying the case upon the merits. The order of the Court was not one denying its jurisdiction of the cause. If the Court had denied its jurisdiction, and had entered judgment on that account, such judgment would be in a proper sense a final judgment, and would be rendered in invitum. But the plaintiff in error in this case, in which the Court asserted its jurisdiction, was not entitled to stop at that stage and seek a review of the action of the Court, but it was incumbent upon him to allow the cause to proceed to trial upon the merits; and then, in the event that he lost, take an appeal from the final judgment. The federal practice does not contemplate that causes shall be tried piecemeal. **If the plaintiff in error should be successful in the present writ of error, there would be nothing to prevent him from filing another suit on the same**

cause of action either in the State Court or in the Federal Court. The judgment, therefore, dismissing the cause is not a final judgment and does not dispose of the cause. Moreover, it was a judgment that was entered in effect upon the invitation of the plaintiff in error. When the cause was called for trial, the plaintiff in error, instead of trying same, merely refused to proceed, and the Court did the only thing it could do under the circumstances, to-wit, dismissed the cause. But there was no final judgment rendered in favor of the defendants in error in the cause or against the plaintiff in error in the cause.

U. S. vs. Evans, 5 Crauch, 280.
Evans vs. Phillips, 4 Wheat, 73.
In re Aspinwall, 90 Fed. Rep. 675.
In re Coe, 149 Fed. Rep. 481.

(b) But even if final judgment had been entered in the cause, this Court would have no jurisdiction to entertain this writ of error because the plaintiff in error, in the writ of error, does not seek to review solely the action of the Court below in reference to the jurisdiction. Under Section Fifth of the Act of March 3, 1891, **this Court has jurisdiction only in cases where the question of jurisdiction alone is an issue.** This is not the case in the present writ of error. The demurrer filed by the defendant in error, Wettengel, was sustained by the Court (Transcript of the record, page 20). Subsequently the plaintiff in error filed an assignment of errors the fifth specification of which was as follows: **"Fifth. The Court erred in sustaining the demurrer of the defendant, George Wettengel."** Thereafter the plaintiff in error filed a petition for a

writ of error in which said petition the plaintiff in error assigned that in the proceedings in this cause "certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignments of error which is filed with this petition." (Transcript of the record, pages 23 and 24.)

It is true that on the 26th day of April, 1905, the plaintiff in error secured from the judge who tried this cause, Hon. Elmer B. Adams, a certificate to the effect that the only question decided by the Court in this cause concerned the jurisdiction of the Court. But subsequently the plaintiff in error evidently decided to raise another question, and as late as the 15th day of September, 1905, five months after filing the assignments of error above mentioned, filed a petition for a writ of error. (In this connection we call attention to a mistake made by counsel for plaintiff in error in their brief, on page 15. There, in setting out the specifications of error, they omit entirely the fifth specification above mentioned and give the sixth specification under the number fifth.) That this Court has jurisdiction only where the single question of jurisdiction of the Federal Court is an issue is definitely decided in McLish vs Roff, 141 U. S., 661, 668, where the Court says:

"The true purpose of the act, as gathered from its context, is that the writ of error, or the appeal, may be taken out after final judgment, except in the cases specified in Section 7 of the Act. **When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case.**"

For the above reasons we respectfully submit that the writ of error herein should be dismissed.

Respectfully submitted,

CHARLES P. WISE,
GEORGE F. McNULTY,
JAMES A. SEDDON,
ROBERT A. HOLLAND, JR.,
Attorneys for Defendants in Error.

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BRIEF OF DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 133.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING CO. AND GEORGE WETTENGEL, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

CHARLES P. WISE,
GEORGE F. McNULTY,
JAMES A. SEDDON AND
ROBERT A. HOLLAND, JR.,
Attorneys for Defendants in Error.

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No. 133.

OCTOBER TERM, 1906.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING CO. AND GEORGE WETTENGEL, DEFENDANTS IN ERROR.

STATEMENT OF DEFENDANTS IN ERROR.

The defendants in error have filed in this Court a motion to dismiss the writ of error. Said motion to dismiss is as follows, caption and signatures being omitted.

"MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR.

Now comes The National Enameling & Stamping Company and George Wettengel, defendants in error, in the above entitled cause, by their attorneys, and move this honorable Court to dismiss the writ of error sued out herein by Conrad Wecker, plaintiff in error.

For ground of their motion defendants in error assign that this Court has no jurisdiction to entertain said writ of error for the following reasons:

I.

Because no final judgment disposing of the entire case has been rendered in this cause. On the contrary a mere judgment of dismissal was entered (transcript of the record, page 20). The said judgment entered against the plaintiff in error was not in invitum, but

was entered practically at the request of the plaintiff in error. In other words, when the case was called for trial, and the plaintiff refused to proceed, there was nothing for the Court to do but to dismiss the cause. There was no judgment entered disposing of the cause, and no judgment which would prevent the plaintiff in error from filing a new suit either in the State Court for an amount less than Two Thousand Dollars, or in the Federal Court for a larger amount. In effect the plaintiff in error took a voluntary non-suit. No writ of error could properly be granted in the case until final judgment had been entered disposing of all the matters in issue.

II.

Because even had final judgment been entered disposing of the entire cause on the merits, this Court would have had no jurisdiction to entertain this writ of error, but a writ of error could only be entertained and passed upon by the United States Circuit Court of Appeals for the Eighth Judicial Circuit. See Act of March 3, 1891, Section Six. This writ of error does not fall within the provisions of Section 5 of said Act which provides that where the jurisdiction of the court alone is an issue, the question of jurisdiction is properly determined by this Court. Reference to the transcript of the record will show that the question of jurisdiction of the court is not the only question involved in this case. The trial Court not only overruled the motion of the plaintiff in error to remand the cause to the State Court, but also sustained the demurrer to the petition of the plaintiff in error filed by George Wettengel, one of the defendants in error. (Transcript of the record, page 20.) It also appears that subsequently the plaintiff in error filed his assignments of

error, one of which is as follows: "Fifth: The Court erred in sustaining the demurrer of the defendant, George Wettengel." (Transcript of the record, page 23.) It also appears that plaintiff in error, in his prayer for a writ of error, avers that certain errors were committed to his prejudice, and assigned that said errors appeared from the assignments of error theretofore filed. (Transcript of the record, pages 23 and 24.)

As the writ of error, therefore, was asked in order that the errors claimed in the assignments of error might be corrected, said writ of error was not sued out merely on the question of jurisdiction. Therefore, this Court has no jurisdiction to entertain or pass upon the writ of error in this cause."

THE MERITS.

This is a case in which the plaintiff in error instituted a suit in a Missouri State Court against the National Enameling & Stamping Company (which, for the sake of convenience, will throughout this brief be called the Stamping Company), a citizen and resident of the State of Illinois. There was joined with said defendant in error one Harry Schenk on the statement that Harry Schenk was a resident of the State of Missouri. In the removal petition, it was averred, under oath, that Harry Schenk was not a resident of the State of Missouri, but was a resident of the State of Illinois. This matter was not controverted by the plaintiff in error, so as to Harry Schenk there is no controversy between the parties as to right of the Stamping Company to remove. The plaintiff in error joined one George Wettengel, a resident of the State of Missouri. The plaintiff in error sought to recover against the said Stamping Company on the ground that it negligently caused him to work near certain pots which were not provided with covers or rails, and that the said Company failed to provide reasonably safe and sufficient hoisting apparatus for elevating the mass of grease, and that said Company negligently gave the plaintiff such instructions as unreasonably endangered the plaintiff's safety. As to defendant, Wettengel, plaintiff alleged that the latter was employed by the Stamping Company and charged by said Company with the duty of superintending and properly planning the construction of said vats or pots and with the duty of providing reasonably safe and suitable covering or railing for same, and with the duty of providing a proper place and reasonably safe and sufficient hoisting apparatus for plaintiff's use,

and with the further duty of properly instructing the plaintiff as to the manner of perf ming his duty. That in spite thereof the said We engel negligently planned the construction of said po s and negligently failed to provide a sufficient hoisting apparatus for the plaintiff, and negligently gave the plaintiff such instructions as unreasonably endangered the safety of plaintiff. (Transcript of the record, pages 4 and 5.)

Thereafter the Stamping Company filed a removal petition **duly verified**, in which it averred that there was a separable controversy in this cause between it and the plaintiff in error. The said removal petition stated that the plaintiff's petition stated no cause of action against the defendant Wettengel, that said Wettengel was not at the time of the accident in question, or prior thereto, charged with the superintendence or oversight of the plaintiff or with the duty of superintending or properly planning the construction of said furnace structure into which the pots were set, and was not charged by the Stamping Company with the duty of providing for the pots reasonably safe and suitable covering, railing or other device to protect the plaintiff from slipping or falling into the same, and was not charged with the duty of properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use, and was not charged with the duty of properly instructing the plaintiff as to the manner of performing his duties. (Transcript of the record, page 9.) **The removal petition further stated that the said George Wettengel was improperly and fraudulently joined with the Stamping Company for the sole purpose of fraudulently and improperly preventing, or attempting to prevent, said Stamping Company from removing the said cause to**

the Federal Court: that the plaintiff well knew, at the time of the bringing of this suit, that the said Wettengel was in no manner charged with the performance of any of the duties which it is alleged he should have performed, and that said plaintiff well knew, at the time of the bringing of this suit, that said Wettengel was not in or about the place where said plaintiff was injured at the time of such injury; that he in no manner was in control or superintendent, and that it was not his duty to plan the construction of said furnace or provide any cover or railing or other devices in or about the said pots, or to provide a reasonably safe hoisting apparatus for plaintiff's use; but that the said plaintiff, with this knowledge, joined the said Wettengel herein solely to prevent the removal of this cause, and not in good faith. (Transcript of the record, page 10.)

Thereafter in the Federal Court the Stamping Company filed two affidavits. The first was that of George Eisenmayer, the chief engineer of the Stamping Company. In this affidavit said engineer stated that he was charged by the Stamping Company with the duty of seeing to the repairs of the apparatus and also planning any new apparatus that was about to be adopted; **that defendant Wettengel was employed in the office of the Stamping Company as a draftsman and his sole work was that of a draftsman and that he had nothing to do with selecting plans or approving plans, but that his sole work was to take the plans and ideas given to him, and to make the necessary drawings for the use of mechanics.** (Transcript of the record, page 17.) The second affidavit was that of defendant George Wettengel, in which he stated that at the time in question and for months previous thereto he

had no duties in the employment of the Stamping Company except to act as draftsman, and that all his work was done in the office of the company; that he had no work whatever outside of the office; was not thrown in contact with employes outside of the office and that he was charged with no duty whatever of superintending the apparatus; that he had no discretion whatever as to what apparatus should be used in defendant's plant, and particularly none in connection with the furnace pots complained of by the plaintiff. **In brief, said Wettengel stated in said affidavit that his position was a clerical one and his duties were limited to the actual making of drawings to enable the mechanics to do the construction work upon the basis of plans adopted by other persons in the employ of defendant;** that Wettengel did not even know the plaintiff by name and did not know what sort of work he was doing, and did not know what part of the plant he was engaged in. (Transcript of the record, pages 18 and 19.)

In opposition to the verified petition of removal and of the two affidavits mentioned above, the only testimony adduced by the plaintiff in error was one affidavit of the plaintiff in error himself in which he states that one George Eisenmayer, prior and up to the time of the construction of the structure in question, was in the employ of the Stamping Company, and was charged with the general supervision of the work and business of said Company at the place in which plaintiff was employed and at which he received his injuires. **That just prior to the construction of the said furnace structure, plaintiff heard the said Eisenmayer direct the said defendant George Wettengel to prepare plans for a furnace structure to be erected upon the spot whereupon, or shortly afterwards, was erected the structure upon**

which the plaintiff was at work when he received the injuries set forth in his petition; that plaintiff, at the time he filed his petition herein, believed, and still believes, that the said defendant George Wettengel, plannd and directed the construction of said furnace structure as set forth in plaintiff's petition filed herein. (Transcript of the record, page 16.)

It appears, therefore, that the plaintiff in error nowhere contradicts the affidavits of the Stamping Company to the effect that Wettengel was entrusted with no duties of superintendence and had nothing to do with discharging the master's duty of furnishing a reasonably safe hoisting apparatus, or with giving the plaintiff in error any instructions. The only thing in the affidavits filed by the Stamping Company that the plaintiff in error contradicts is in reference to the planning of the furnace structure in question. In regard to that he no longer asserts that Wettengel was charged with the duty of superintendence, but states that Eisenmayer was so charged, and that on one occasion he heard Eisenmayer direct the defendant Wettengel to prepare plans for a furnace to be erected upon the spot where the plaintiff was injured. This in reality is not a contradiction at all, but is compatible with all of the affidavits filed by the Stamping Company to the effect that George Wettengel's work was exclusively that of a draftsman in the office, and that he executed detailed plans at the direction of superiors, said detailed drawings to be used by the mechanics. All the plaintiff in error, in said affidavit, avers is that on one occasion he heard Eisenmayer tell Wettengel to "prepare plans for a furnace structure." He does not even state that Wettengel made said plans or that the furnace was built in accordance therewith.

The Court below, after considering the complaint of plaintiff in error, the verified removal petition, and the affidavits above mentioned, reached the conclusion that the defendant Wettengel, a resident of Missouri, was joined as defendant not in good faith, but solely for the purpose of preventing the Stamping Company from removing the cause to the Federal Court. The grounds of the Court's action are clearly set forth in the opinion rendered by the District Judge on the motion to remand and on the motion in arrest of judgment. (See transcript of the record, pages 25, 26 and 27.) These opinions show that the Court reached the conclusion that the joinder of defendant Wettengel was not in good faith, first because the petition not only failed to state a cause of action against the defendant Wettengel, but affirmatively showed that no cause of action existed against said defendant, and secondly because the testimony introduced in the form of affidavits showed that the joinder was not made in good faith.

BRIEF OF THE ARGUMENT.

I.

The motion to dismiss this writ of error should be sustained—

(a) Because the writ of error was not sued out to review a final judgment.

McLish vs. Roffy, 141 U. S. 661.
U. S. vs. Evans, 5 Crauch 280.
Evans vs. Phillips, 4 Wheat 73.
In re Aspinwall, 90 Fed. Rep. 675.
In re Coe, 49 Fed. Rep. 481.

(b) Because the question of jurisdiction of the Federal Court is not the only question raised.

McLish vs. Roffy, 141 U. S. 661, 668.

II.

The Court below did not err in overruling the motion of plaintiff in error to remand the cause.

(a) Because there was a separable controversy as to defendant in error, Stamping Company, the joinder of defendant in error, Wittengel, not being in good faith.

Hartog vs. Memory, 116 U. S. 588, 591.
Farrell vs. O'Brien, 199 U. S. 89, 100.
Gustafson vs. Railway, 128 Fed. Rep. 85.
Ross vs. Erie Railway, 120 Fed. Rep. 703, 704.
Durkee vs. Railroad, 81 Fed. Rep. 1.
Boatner vs. Amer. Express Co., 122 Fed. Rep. 714.
Hukill vs. Maysville, 72 Fed. Rep. 745.
Alabama Railway vs. Thompson, 26 Sup. Ct. Rep. 161.

(b) The lack of good faith appeared on the face of the petition of plaintiff in error because said petition shows on its face that plaintiff in error never had a cause against the resident defendant.

Steinhauser vs. Spraul, 127 Mo. 541.
Carey vs. Rocherau, 16 Fed. Rep. 87.
Kelly vs. Railroad, 122 Fed. Rep. 286.
Prince vs. Ill. Central R., 98 Fed. Rep. 1.
Davenport vs. Railway, 124 Fed. Rep. 983.
Shaffer vs. Union Brick Co., 128 Fed. Rep. 97.
O'Neil vs. Young, 58 Mo. App. 628.
Harriman vs. Stowe, 57 Mo. 93.
Stone vs. Cartwright, 6 Durnford & East., 411 (Kings Bench).
Ferguson vs. Railway, 63 Fed. Rep. 177.

(c) Because the verified removal petition and the affidavits filed by the removing defendant abundantly show that the joinder of the resident defendant was wrongful, and for the sole purpose of attempting to prevent removal.

Kelly vs. Railway Co., 122 Fed. Rep. 286, 289.
Free vs. Western Union, 122 Fed. Rep. 309, 313.
Kansas City Ry. vs. Daughtry, 138 U. S. 303.

ARGUMENT ON MOTION TO DISMISS.

The above motion is self-explanatory, and a citation of authorities in support thereof is hardly necessary.

The first ground of the motion is that the judgment rendered in this cause is not a judgment from which, under the federal practice, a writ of error lies. The fundamental principle governing such matters is that a party can never sue out a writ of error to review a judgment unless the judgment is final and is rendered against him in invitum. (McLish vs. Roff, 141 U. S., 661, 668.) The practice existing in certain code states allowing the plaintiff, upon an adverse ruling of any kind being made to take a non-suit with leave to subsequently appeal therefrom does not exist in the Federal Courts. **In this case the plaintiff in error in effect took a voluntary non-suit.** It is true that the Federal Court overruled the motion of plaintiff in error to remand, but this did not prevent the plaintiff in error from trying the case upon the merits. The order of the Court was not one denying its jurisdiction of the cause. If the Court had denied its jurisdiction, and had entered judgment on that account, such judgment would be in a proper sense a final judgment, and would be rendered in invitum. But the plaintiff in error in this case, in which the Court asserted its jurisdiction, was not entitled to stop at that stage and seek a review of the action of the Court, but it was incumbent upon him to allow the cause to proceed to trial upon the merits; and then, in the event that he lost, take an appeal from the final judgment. The federal practice does not contemplate that causes shall be tried piecemeal. **If the plaintiff in error should be successful in the present writ of error, there would be nothing to prevent him from filing another suit on the same**

cause of action either in the State Court or in the Federal Court. The judgment, therefore, dismissing the cause is not a final judgment and does not dispose of the cause. Moreover, it was a judgment that was entered in effect upon the invitation of the plaintiff in error. When the cause was called for trial, the plaintiff in error, instead of trying same, merely refused to proceed, and the Court did the only thing it could do under the circumstances, to-wit, dismissed the cause. But there was no final judgment rendered in favor of the defendants in error in the cause or against the plaintiff in error in the cause.

U. S. vs. Evans, 5 Crauch, 280.
Evans vs. Phillips, 4 Wheat, 73.
In re Aspinwall, 90 Fed. Rep. 675.
In re Coe, 149 Fed. Rep. 481.

(b) But even if final judgment had been entered in the cause, this Court would have no jurisdiction to entertain this writ of error because the plaintiff in error, in the writ of error, does not seek to review solely the action of the Court below in reference to the jurisdiction. Under Section Fifth of the Act of March 3, 1891, **this Court has jurisdiction only in cases where the question of jurisdiction alone is an issue.** This is not the case in the present writ of error. The demurrer filed by the defendant in error, Wettengel, was sustained by the Court (Transcript of the record, page 20). Subsequently the plaintiff in error filed an assignment of errors the fifth specification of which was as follows: **"Fifth. The Court erred in sustaining the demurrer of the defendant, George Wettengel."** Thereafter the plaintiff in error filed a petition for a

writ of error in which said petition the plaintiff in error assigned that in the proceedings in this cause "certain **errors** were committed to the prejudice of this plaintiff, all of which will more in detail **appear** from the assignments of error which is filed with this petition." (Transcript of the record, pages 23 and 24.)

It is true that on the 26th day of April, 1905, the plaintiff in error secured from the judge who tried this cause, Hon. Elmer B. Adams, a certificate to the effect that the only question decided by the Court in this cause concerned the jurisdiction of the Court. But subsequently the plaintiff in error evidently decided to raise another question, and as late as the 15th day of September, 1905, five months after filing the assignments of error above mentioned, filed a petition for a writ of error. (In this connection we call attention to a mistake made by counsel for plaintiff in error in their brief, on page 15. There, in setting out the specifications of error, they omit entirely the fifth specification above mentioned and give the sixth specification under the number fifth.) That this Court has jurisdiction only where the single question of jurisdiction of the Federal Court is an issue is definitely decided in McLish vs Roff, 141 U. S., 661, 668, where the Court says:

"The true purpose of the act, as gathered from its context, is that the writ of error, or the appeal, may be taken out after final judgment, except in the cases specified in Section 7 of the Act. **When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case.**"

ARGUMENT ON THE MERITS.

We think it is clear that the Court below did not err in refusing to remand the cause to the State Court on the ground that there was a separable controversy between the plaintiff in error and the Stamping Company, and that the joinder of defendant Wettengel was not made in good faith, but was made solely for the purpose of attempting to avoid removal.

I.

(a) It is well settled that where the joinder of resident defendants is not made in good faith, such joinder will not prevent a removal. In Louisville R. Co. vs. Wangelin, 132 U. S. 599, the Court, after laying down the general rule that the question of separable controversy is determined by the averments of the comlpaint, makes the following qualification: "unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

In Gustafson vs. Chicago, R. I. & P. Ry. Co., 128 Fed. Rep. 85, the court, in announcing the above rule, says: "Since the publication of the decision in the Dixon case, the practice of attorneys in personal injury cases, in joining a local resident defendant, like an engineer, brakeman, or other employe, with the non-resident railroad company, to prevent the removal by the railroad company from the State to the United States court, is becoming so universal as to invite the courts to closest scrutiny to see whether, in fact and law, there actually exists a joint cause of action, or merely a simulated one. While the policy of the judiciary act of 1887-88 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St.

1901, p. 508]) was rather to restrict than enlarge the jurisdiction of United States courts, it is just as applicable today as it ever was what Judge Lurton in Arrowsmith vs. Nashville & D. R. Co. (C. C.), 57 Fed. 169, quotes from the language of Mr. Justice Miller, that:

> 'It would be a very dangerous doctrine — one utterly destructive of the right which a man has to go into the federal courts on account of his citizenship—if the plaintiff in the case, in instituting his suit, can, without any right or reason or just cause, join persons who have not the requisite citizenship, and thereby destroy the rights of parties in federal courts. **We must threfeore be astute not to permit devices to become successful which are used for the very purpose of destroying that right.'**

"If this growing practice be further extended, under a latitudinarian construction, beyond what was really decided in the Dixon Case, and those in consonance therewith, the practical result is to be a denial to non-resident corporations of the right of removal from the local to the federal courts. The persistent insistence of attorneys for such plaintiffs is that just in so much as, by mere allegation in the petition, a joint cause of action can be apparently stated, regardless of the motive of the pleader and the underlying facts, they may effectually cut off even a technical analysis of the petition, to see whether in point of law a joint cause of action is stated, and any resort to evidence in pais on the issue of removal and remand. But the right and the duty of the court are well recognized to examine the petition by its "four corners," to see if a joint cause of action is stated; for, no matter how designedly and repetitiously the pleader may assert that 'the de-

fendants' did so and so, such assertions will be treated as a mere brutum fulmen, if, taking the facts as a whole stated in the petition, they disclose, in contemplation of law, a separable cause of action against the defendants. As held by the Supreme Court of this State, the allegation of negligence on the part of the defendants in general terms is treated as mere surplusage—words without meaning—when preceded or followed by specific allegations of specific acts of negligence. Fuchs vs. City of St. Louis, 167 Mo. 620, 640, 67 S. W. 610, 57 L. R. A. 136; Chitty vs. Railway, 148 Mo. 64-75, 49 S. W. 868; McCarty vs. Hotel Co., 144 Mo. 397, 402, 46 S. W. 172.

"And as already stated, even where the petition on its face alleges a joint cause of action, or some joint acts of the defendants, the non-resident defendant may challenge the truth of it in his petition for removal by alleging that it was inserted for the purpose of preventing the exercise of the right of removal by the non-resident defendant, and this issue of fact is to be determined by the United States court. And if any material fact alleged in the petition, for the purpose of showing a joint cause of action, be found to be untrue in fact, and such fact was known to the pleader, or could have been known to him by the exercise of that inquiry which the law exacts, the court is warranted in drawing the conclusion, as a matter of law, that the purpose was to prevent the right of removal by the non-resident defendant. Union Terminal Railway Co. vs. Chicago, B. & Q. R. R. Co. (C. C.), 119 Fed., loc. cit. 213."

See also Ross vs. Erie R. Co., 120 Fed. Rep. 703, 704; Durkee vs. R. Co., 81 Fed. Rep. 1; Boatner vs. Amer. Express Co., 122 Fed. Rep. 714; Hukill vs. Maysville

& B. T. R. Co., 72 Fed. Rep. 745; Hartog vs. Memory, 116 U. S. 588, 591; Farrell vs. O'Brien, 199 U. S. 89, 100.

Counsel cite the recent case of Railway vs. Thompson, 26 Sup. Ct. Rep., page 161, but that case merely holds that there is no separable controversy when defendants are properly joined in good faith. In the case of Chesapeake & Ohio Ry. Co. vs. Dixon, 179 U. S. 131, much relied upon by counsel, the Court, in denying the right of removal, calls special attention to the fact that "the petition for removal did not charge fraud in that regard or set up any facts and circumstances indicative thereof."

(b) The petition of plaintiff in error not only fails to state a cause of action against the defendant Wettengel, but shows affirmatively that the plaintiff in error had no cause of action against said defendant. It is true in one place the petition alleges joint negligence, but the plaintiff in error goes on to specify both the negligence of the Stamping Company, and the supposed negligence of Wettengel. The said specifications of negligence are failures to perform duties personal to the master in reference to furnishing a reasonably safe place to work and giving sufficient instructions. The petition alleges that the Stamping Company failed in this connection, and then goes on to state that the defendant Wettengel was charged with the duty of superintendency and failed, in connection with said duties of superintendence, to fulfill certain duties that were personal to the master. There is no charge that the defendant, Wettengel, did any positive act or was guilty of any misfeasance such as running a train too rapidly, or putting too much power on an engine or improperly handling a hoisting apparatus, in short no charge that defendant Wettengel as a member of society violated

any duty which he as a member of society owed the plaintiff in error. On the contrary, the averment is merely that the master was charged with certain personal duties in reference to furnishing the plaintiff in error a reasonably safe place to work, that the master delegated the discharge of these duties to defendant, Wettengel, and that defendant, Wettengel, failed in the performance thereof. **But they were all duties that defendant Wettengel did not and could not owe to plaintiff in error, and for a violation of which Wettengel was not and could not be liable to plaintiff in error.** Under these circumstances, the Court below rightly held that the petition did not state a cause of action against defendant, Wettengel.

The general rule well established throughout this country is that an agent is only liable for acts of misfeasance, and is not liable for acts of nonfeasance. In other words, an agent is responsible to his principal alone for failure to carry out his duty as agent, but is not responsible to third persons for such failure. But if the agent, in the course of his work, commits any acts of misfeasance which result in injury to third persons, he is liable therefor. This liability, however, arises not from the fact that he is acting as agent of another, but merely because, as a member of human society, he owes a duty to other members of human society not to injure them by his carelessness or recklessness. If the law were different, it would impose great hardships upon servants. In this case the master was charged with the duty of furnishing a reasonably safe furnace. A superintendent is not charged with that duty even to his master, unless he is instructed by his master to make the furnace safe. If the master commands his superintendent to construct a furnace in an unsafe way, it is the duty of

the latter to obey, and he discharges his entire duty as the agent if he follows the instructions of his master. In such case would it not be a gross injustice to hold the superintendent liable for failure to furnish a reasonably safe furnace, when he furnished one in exact compliance with his instructions! As agent, such a superintendent is in privity with his principal alone, and as agent he discharges his entire duty if he obeys the orders of his principal. And even though he fail to discharge any of the duties of his agency, he would be liable for such failure to his principal alone. This rule is well stated in the case of Steinhauser vs. Spraul, 127 Mo. 541.

> **"A servant or deputy quantenus, such, cannot be charged for it, but for misfeasance an action will lie against the servant or deputy, but not quantenus a deputy or servant, but as a wrongdoer."**

The rule is also well expressed in the case of Carey vs. Rocherau, 16 Federal Reporter 87, where the Court says:

> **"It is very doubtful if an agent per se is liable to a third person on any account. A person acting as an agent for another is liable for his own misfeasance, but it results not from the agency, but in spite of it."**

A very excellent discussion of this principle is to be found in the case of Kelly vs. Railroad, 122 Federal Reporter, page 286. There an employe of a railroad company charged with the duty of inspection was joined with the railroad company in an effort to prevent removal. The Court held that the petition stated no cause of action against the employe, and for this and the further reason that the joinder of the employe was not in good faith remanded the cause. In this case the plain-

tiff sought to state a cause of action against employe Strauss on the ground that he was the yardmaster in the employ of the railroad company and that he neglected to perform his duty, in that he failed to make an inspection of an engine, that by reason of his negligence in not making the inspection the engine was not capable of standing the pressure of steam required to pull the train of cars in question, and that an explosion ensued.

The Court says:

> "Under the allegations of this petition, Strause was a mere servant of the railway company, charged with the duty of inspecting the engines of the company before they were suffered to go out of the defendant's yards at Slater, Mo. **His failure to do this was simply an act of omission or nonfeasance, and nothing more. I understand the law to be that the agent or servant is personally liable to third parties for doing something—committing a positive act—which he ought not to have done, but not for doing something that he ought to have done.** In the latter case he is liable only to his employer. Ewell's Evans on Agency, p. 438. Story on Agency (9th Ed.), 308, 309, in discussing this question, said:
>
> " 'We come, in the next place, to the consideration of the liability of agents to third persons in regard to torts or wrongs done by them in the course of their agency. And here the distinction ordinarily taken is between acts of misfeasance or positive wrongs, and nonfeasance, or mere omissions of duty, by private agents. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences and omissions of duty of his agent; leaving him to his

remedy over against the agent in all cases where the tort is of such a nature as that he is entitled to compensation. The agent is also personally liable to third persons for his own misfeasances and positive wrongs. **But he is not liable to third persons for his own nonfeasances or omissions of duty in the course of his employment. His liability in these latter cases is solely to his principal. And hence the general maxim as to all such negligences and omissions of duty is, in cases of private agency, respondeat superior.** The distinction, thus propounded, between misfeasance and nonfeasance, between acts of direct, positive wrong, and mere neglects by agents as to their personal liability therefor, may seem nice and artificial and partakes perhaps not a little of the subtlety and over-refinement of the old doctrines of the common law. It seems, however, to be founded upon this ground; that no authority whatsoever from a superior can furnish to any party a just defense for his own positive torts or trespasses, for no man can authorize another to do a positive wrong. **But in respect to nonfeasance or mere neglects in the performance of duty the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other, and no man is bound to answer for any such violations of duty or obligation, except those to whom he has become bound or amenable for his conduct.''**

In Prince vs. Illinois Central, 98 Federal Reporter 1, the plaintiff sought to state a cause of action against certain employes of the railroad as follows: While coupling cars his foot was caught in a frog because the frog was open and not properly blocked or plugged. He averred that the failure to block or plug the frog was the result of the negligence alike of the railroad company and of two of its employes, one a section boss

and the other a yardmaster. The Court in that case decided that the petition stated no cause of action against said employes, also that the petition with the testimony taken together showed that the joinder of the employes was clearly for the fraudulent purpose of preventing removal. In that case the Court ably discusses the question of the liability of an agent to third persons for failure to discharge duties imposed upon him by his principal.

> "The same cases also seem to make clear the proposition that there was no such privity of contract or of relation or otherwise between the plaintiff and either Carroll or Smith as to make either of them liable in either event to the plaintiff for the injury. They were the employes of the railroad company. **They owed no duty to the plaintiff under the circumstances of this case, whatever may have been their obligations to the railroad company; and while their superior, the common employe of all the parties, may be responsible to the plaintiff, it by no means follows that Carroll or Smith is in any way liable.** Evidently it is a case where the master, if any one, must respond for the damage instead of the servant."

The case of O'Neil vs. Young, 58 M. A. 628, is identical in principle with this. There it was sought to hold an agent responsible for the defective condition of a hoist. The suit was brought by a person injured by a falling hoist against the corporation that owned and operated the hoist, and also against an individual who was acting as foreman at the time. The ground of the suit was negligence in allowing a rope connected with the hoist to become weak and defective. The Court says, in reference to the liability of the individual, page 635:

"**It is only where the agent is guilty of active negligence, that is, of some act of misfeasance, that he can be made to answer to third parties.** Harriman vs. Stowe, 57 Mo. 98; Lottman vs. Barnett, 62 Mo. 159; Steinhauser vs. Straul, 114 Mo. 551. * * * **If the inspection made by Young was carelessly done, then at most he was guilty of nonfeasance or omission of duty for which his company alone could not be held.** This placed the plaintiff's right of recovery, if any he had, on the neglect of the defendant company to have the elevator properly inspected and kept in repair. **If these duties devolved on Young as manager of the company, and he neglected them, they were only acts of nonfeasance on his part.**"

In the case of Harriman vs. Stowe, 57 Mo. 93, the question arose as to the liability of an agent who negligently repaired a trap door and negligently left the same in an unsafe condition. In this case the Court says, page 98:

"'Judge Story says the distinction ordinarily taken, is between acts of misfeasance, or positive wrong, and nonfeasance, or mere omission of duty by private agents. The law on this subject as to principals and agents, is founded upon the same analogies as exist in the case of masters and servants. The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servants, in all cases within the scope of his employment. So the principal in like manner, is liable to third persons for the like misfeasances, negligences and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases where the tort is of such a nature that he is entitled to compensation. **The agent is personally liable to third persons for his own misfeasance and positive wrongs, but he is not in general liable to third persons for his own**

nonfeasances or omissions of duty, in the course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons; and the privity existing only between him and his principal. Therefore, the general maxim as to all such negligence and omissions of duty is, in cases of private agency, respondeat superior.'

"The true distinction, as stated by Story, is between acts of misfeasance, or positive wrongs, and nonfeasance, or mere omissions of duty. In the latter case, the master or principal is alone liable to third persons; whilst in the former, the responsibility rests upon both principal and agent."

The Court then goes on to point out that the act of the servant in constructing a trap door, and in leaving it there, so as to hurt pedestrians was not an act of nonfeasance, but was an act of misfeasance or positive wrong, and that the agent was held liable not because as agent he owed any duty to the plaintiff, but because as a member of society he was under obligation not to set such a dangerous trap for his fellowman.

Perhaps the most carefully considered case on this subject is that of Steinhauser vs. Spraul, 127 Mo. 541. There a woman was sued for negligence in furnishing an insufficient ladder to a domestic who was in the employ of the said woman's husband. The effort was made to hold the wife of the employer on the ground that she, as agent, was also liable. The Court says, page 552:

"In a very early case, Chief Justice Holt clearly drew the distinction between the nonliability of a person to a third party because of negligence, or nonfeasance, and misfeasance, or positive wrong, saying: 'It was objected at the bar that they have this remedy against Breese. I agree, if they could

prove that he took the bills, they might sue him for it; so they might anybody else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant, and then his neglect is only chargeable on his master, or principal; **for a servant or deputy, quatenus such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrongdoer.** Of course, no such aggressive and positive omission can be laid at the door of defendant, and consequently no such liability as springs from an omission of that sort.

"**There are cases where a servant is liable to his fellow servant for negligence resulting in injuries to the latter; but it is believed it will be found upon examination that no such liability attaches except where some physical act is done by the servant, and results to the damage of his fellow, or where the servant occupies an independent plane, and his orders to his fellow servants are equivalent in force, effect and resultant injury to a physical act, as in Bell vs. Josselyn, supra.**"

The same doctrine is very clearly laid down in the case of Stone vs. Cartwright, 6 Durnford & East, 411 (King's Bench). In that case a certain party owned and operated a colliery. The owner's agent was sued for negligence in the operation of the same that resulted in injury to adjoining property. In his opinion Lord Kenyon used the following language:

"There is no pretense whatever for imputing liability to the defendant in this cause. **It might as well be contended that a similar action would lie against the steward of another for all the defaults or improper conduct of the men under him by which any other received damage. In all these**

cases I have ever understood that an action must ever be brought against the one committing the injury or against the owner for whom the work is done, but it is never heard of that a servant who hires laborers for his master was answerable for all of their acts." In the same opinion Grose uses the following language: "It frequently happens that a person's gardener employs laborers under him, yet it could never be contended that on that account he would be answerable for damage done by them in the course of their employment."

In Davenport vs. Southern Railway Company, 124 Federal Reporter 983, the Court says:

> "The Southern Railway Company is responsible to third persons for negligence of its agents, but for negligence merely these agents are not responsible to third persons. Ewell's Evans on Agency, 438. Negligence is negative in its character. It is the omission to perform some duty. Milwaukee Etc. Rd. vs. Arms, 91 U. S. 489, 23 L. Ed. 374. It implies nonfeasance, and is contradistinguished from misfeasance. To make the agent responsible to third persons, there must be some positive act or wrong on his part. The whole doctrine is clearly stated in Story on Agency (9th Ed.), Paragraphs 308-309."

In Shaffer vs. Union Brick Co., 128 Federal Reporter 97, the Court says:

> "A servant may or may not be liable depending upon the nature of the act performed. For example, a servant may wholly fail to perform any of the duties imposed upon him by the master. Injury resulting to third persons from such failure, the master will be responsible to the injured person. The servant will not be liable to such third person, but to the master only. In such case there is no joint liability because the master alone is liable."

In Ferguson vs. Railway Co., 63 Fed. Rep. 177, the plaintiff sought to recover against the company and two of its employes. There the Court says: "It is clear in the present case that the plaintiff counts upon the legal duty of the railway company to furnish for the use of its servants machinery and appliances properly constructed and equipped, and avers as a breach of this legal duty that the engine was not built for switching purposes, and was not properly equipped with railings, catch-rods, etc. If the company fell short of its duty in this respect, and the plaintiff suffered injury by reason thereof, then a right of action existed in favor of plaintiff, based upon the cause named, to-wit: the failure of the master, in the performance of its duty, to furnish proper machinery and appliances for the use of its employes. **The petition does not, nor could it rightfully, charge the engineer or yardmaster with this duty, and with a consequence of the breach thereof.** These men were but co-servants with the plaintiff, and were under no legal obligation to furnish any machinery for his use. It is certainly clear that if the plaintiff had sued the engineer or yardmaster alone, and had based his action upon the averment that the engine was not properly equipped, he could not recover, because it could not be shown that they were under any legal obligation to furnish a safely equipped engine for his use. **That was the obligation of the master, and not of the servant.**"

In the Dixon Case cited by counsel, suit was brought against a railroad company and two employes, and the averment was that the deceased, while crossing a railroad track, was run over and instantly killed by the negligence of the company, committed through its engineer and fireman. The negligence is not specified, and

it is impossible to determine, from the petition, whether the acts of the engineer and fireman were acts of nonfeasance or misfeasance. This case, therefore, has no bearing on the question at issue here.

(c) We have stated above the first ground upon which the Court below based its decision that defendant Wettengel was joined for the fraudulent purpose of preventing removal, to-wit: on the ground that the petition showed on its face that there was no couse of action against defendant, Wettengel. We come now to the second ground upon which the Court based its conclusion, to-wit: the testimony introduced in the case by the parties. We have already referred to this testimony above, giving an outline of the verified removal petition and of the affidavits. We showed that the verified petition for removal set out in detail that the defendant Wettengel had no duties whatever of superintendence, and that he had nothing to do with planning the construction of the structure mentioned in the evidence, but that his sole duties were as draftsman in the office making detailed drawings for mechanics; that plaintiff well knew all this at the time he filed his petition and that defendant Wettengel was joined for the fraudulent purpose of preventing removal. We also showed that the affidavits of Eisenmayer and Wettengel fully sustained the statements of the removal petition to the effect that Wettengel had no duties whatever as an employe of the Stamping Company except to make detailed drawings for mechanics, and that he had no duties whatever of superintendence. Finally we called attention to the fact that the only testimony introduced by the plaintiff in error was the affidavit of the plaintiff in error himself, in which he admits that Eisenmayer was charged with the general superintend-

ence of the work and business of the Stamping Company and merely states that on one occasion he heard Eisenmayer direct Wettengel to prepare plans for a furnace. In other words, three affidavits were introduced by the Stamping Company showing that Wettengel had no work whatever for the Stamping Company except as draftsman in the office of the Stamping Company, and these affidavits were in no way contradicted by the plaintiff in error. In his single affidavit, he does not state that Wettengel had any duties of superintendence, any duty to see to it that the place where he was required to work was reasonably safe, but alleges solely that he once heard Eisenmayer, the superintendent, direct him to prepare plans for a furnace. He does not state whether Wettengel was to determine what sort of furnace should be introduced, but merely states that he was to prepare the plans. This is entirely in harmony with the affidavits introduced by the Stamping Company that he made plans for mechanics under the direction of his superiors, and there is nothing in the affidavit to the effect that Wettengel did in fact make the plans for this furnace at which the plaintiff in error claims to have been injured. So we believe the Court was amply warranted in finding, on the ground of the testimony alone, that the plaintiff in error did not act in good faith when he joined Wettengel as a party defendant.

Counsel state in their brief, page 29, that the affidavits referred to by the court do not state that the plaintiff in error or his counsel knew that any of the allegations complained of were false, or that any of the allegations complained of were not made in good faith with the expectation of proving them. Counsel evidently overlooked the verified petition for removal, which reads as follows: "Said plaintiff well knew at

the time of the bringing of this suit, that said Wettengel was in no manner charged with the performance of any of the duties which it is alleged he should have performed in said petition, and the said plaintiff well knew at the time of the bringing of this suit that the said Wettengel was not in or about the place where the said plaintiff was injured, at the time of the said injury; that he in no manner was in control or superintendent; that it was not his duty to plan the construction of the said furnace or to provide any covering, railing or other device in or about the said pots or to provide reasonably safe and sufficient hoisting apparatus for plaintiff's use, but that the said plaintiff, with this knowledge, joined the said Wettengel herein solely to prevent the removal of this cause and not in good faith."

Counsel in their brief contend that the charge of fraud in this case cannot be properly established by affidavit, and that there is no authority for such procedure. The objection of counsel is untimely. When the affidavits were filed by the defendant in error, no objection was made thereto and no exception made to their use. On the contrary, after they were filed, the plaintiff in error filed one in support of his contention. He not only thereby conceded the right to the filing of the affidavits by the Stamping Company and to the use of them by the court, but actually filed one himself and presented it to the court for consideration. He therefore is not in a position to complain of the kind of testimony upon which the question was submitted to the court. But, apart from the above considerations, the authorities abundantly establish that the question of good faith is properly determinable upon affidavit.

In Kelly vs. Railway Co., 122 Federal Rep. 286-289, the court says:

"Even where the petition stating the cause of action on its face presents a joint liability between a resident and non-resident defendant, it may nevertheless be shown in the petition for removal that no cause of action exists against the resident defendant and that his joinder as a co-defendant was for the purpose of defeating the removal of the cause, **and that where this allegation of the petition for removal is supported by proofs, as by affidavits, it devolves upon the plaintiff to take issue upon this fact, which issue shall be tried in the United States court, and if the plaintiff fail to controvert such petition and affidavit, the allegations of the petition for removal stand admitted.** Ross vs. Erie R. Co. et al. (C. C.), 120 Fed. 703; Dow vs. Bradstreet Company et al. (C. C.), 46 Fed. 824, 827, 828; Durkee vs. Illinois Central Railroad Company (C.C.), 98 Fed. 1; Arrowsmith vs. N. & D. R. Co. (C. C.), 57 Fed. 170."

In Free vs. Western Union Telegraph Co., 122 Fed. Rep. 309, 313, it was held that an unverified complaint that resident operators of a non-resident telegraph company were jointly liable with two operators for the delay in delivering a message, was insufficient to prevent a removal where the verified petition for removal was supported by the affidavits of such operators, that neither of them was on duty nor had anything to do with either receiving or delaying the message. The court says:

"But, aside from all that, what do we have? On the one side, the unsupported allegations of the petition, not verified, are to the effect that all three defendants are jointly liable, and that because Mullen and Neely were the operators who received and delayed delivering the message. **On the other side, we have the verified petition for removal, supported by the affidavits of both Mullen and Neely, that they and neither of them**

were on duty; had nothing to do with either receiving or delaying the message; that the only message received from Ida Whittier was addressed, not to the plaintiff, but to another party; and that message was received by an operator by the name of Colver. If the removal of this case can be prevented, then a little bit of display of the imagination set forth in a petition unsupported by any kind of proof can render nugatory the entire act of Congress upon the subject."

This controversy is conclusively settled by the case of Kansas City Railroad vs. Daughtry, 138 U. S. 303. There in an unverified petition the plaintiff claimed that the defendant was a non-resident. The defendant filed a petition for removal in which, under oath, he stated that he was a non-resident. There the court says:

> **"It is true the petition is not verified, contrary to good practice, but Daughtry's affidavit was explicit, so that if the record had been filed in the Circuit Court, the cause would, as it then stood, have been remanded. But this would not justify the State court in acting upon the facts, though it arrived at the same result."**

For the above reasons, we are of the opinion that the court has no jurisdiction to entertain this writ of error. If, however, the court decides this point adversely to us, we respectfully submit that the lower court did not err in overruling the motion of plaintiff in error to remand this cause, and in rendering a judgment of dismissal against the plaintiff in error when the latter, on call of the case, refused to prosecute the same.

Respectfully submitted,

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